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In The

# Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER

*v.*

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR SOCIETY OF AMERICAN LAW TEACHERS AS AMICUS CURIAE SUPPORTING RESPONDENTS

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## BRIEF FOR SOCIETY OF AMERICAN LAW TEACHERS AS AMICUS CURIAE SUPPORTING RESPONDENTS[1]

The Society of American Law Teachers respectfully submits this brief as amicus curiae in support of respondents.

## INTEREST OF AMICUS CURIAE

Founded in 1973, the Society of American Law Teachers ("SALT") is the largest independent membership organization of legal academics in the United States. Law professors, deans, librarians, and administrators from more than 200 law schools make up SALT's membership. Virtually all active SALT members hold full-time positions in legal education.

Central to SALT's mission is its commitment to "mak[ing] the legal profession more inclusive and reflective of the great diversity of this nation." SALT understands that the most effective way to make collegiate, graduate, and professional academic programs more representative of our Nation's diverse populations is to utilize holistic admissions processes

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[1] Letters from the parties providing blanket consent to the filing of amicus briefs are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

that incorporate race consciousness as one of many factors. Since the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), positive steps toward diversity have been realized, but African Americans and Latinos, in particular, remain woefully underrepresented at all levels of higher education. Until this imbalance is corrected, race-conscious affirmative-action programs remain a necessity.

SALT has supported race-conscious admission policies before this Court in four previous cases. In 1978, SALT filed a brief amicus curiae in support of petitioner in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In 2003, SALT filed a brief amicus curiae in support of the University of Michigan Law School in *Grutter*. SALT also supported the University of Texas with a brief amicus curiae in *Fisher v. University of Texas at Austin* ("*Fisher I*"), 133 S. Ct. 2411 (2013), and, most recently, supported respondents in *Schuette v. Coalition to Defend Affirmative Action, Intergration and Immigrant Rights and Fight for Equality By Any Means Necessary* (*BAMN*), 134 S. Ct. 1623 (2014).

SALT's support of diversity in legal education has not been limited to the filing of briefs amicus curiae. It has organized many scholarly conferences; supported studies of bias in standardized testing, including the LSAT and state bar exams; created programs to mentor diverse minorities, including young academics, law students, and potential law students; and led efforts to assure financial support for low-income law students. SALT also recently submitted a shadow

report on Racial Discrimination in the Legal Profession to the United Nations Committee on the Elimination of Racial Discrimination (June 30, 2014), http://www.saltlaw.org/wp-content/uploads/2014/07/June-30-SALT-FINAL-to-CERD-2.pdf.

The issues raised in the present case are of particular concern to SALT and its membership. Although this case is focused on undergraduate admissions, SALT recognizes that each law school's ability to admit a strong and diverse entering class is directly tied to the pool of available college graduates. A ruling against the University of Texas will be followed by public universities across the Nation. If universities throughout the country are forced to abandon race-conscious admission programs, the number of racially diverse undergraduate students will decrease dramatically. In turn, the pool of graduates entering the legal profession, government service, and positions of leadership in the private sector will not reflect the diverse talents, resources and capabilities of this Nation.

## INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly four decades, this Court has held that race-conscious admissions policies satisfy the Equal Protection Clause when race is employed as "a positive or favorable factor" to "achiev[e] the educational benefits of a more diverse student body." *Fisher I*, 133 S. Ct. at 2417. The Fifth Circuit's decision is faithful to that principle and should be affirmed.

The University of Texas selects applicants based on multiple criteria to secure the numerous educational benefits that come from having an accomplished, diverse, and vibrant student body. Although many students are admitted based solely on class rank, others are evaluated holistically to identify those students whose accomplishments transcend impersonal measurement. In evaluating the latter group, the University's holistic-review program treats each applicant as an individual, considering each person's unique set of experiences, activities, interests, honors, economic circumstances, and race—but without assigning a fixed weight to any particular factor.

Such review is necessary to achieve the University of Texas's educational mission, which includes providing students a holistically diverse educational environment. As this Court has explained, holistic diversity involves more than simply achieving a predetermined racial balance—or fulfilling a quota. Rather, holistic diversity demands an educational

environment rich with diversity of viewpoint, diversity of experience, diversity of talent, and—if a school chooses—diversity of race. In the University's considered judgment, it could not achieve the educational benefits of true holistic diversity without modestly considering race in the context of each individual's other attributes, talents, and experiences.

To be sure, the University's Top 10% Plan achieved a significant degree of purely numerical racial diversity. But following years of experience with that program, the University's expert academicians concluded that simply increasing the percentage of minority students did not provide the educational benefits of holistic diversity. Because individuals of the same race do not invariably think alike, the University determined that greater diversity of race did not invariably translate into greater diversity of viewpoint, experience, or talent. Accordingly, the University realized that race-conscious holistic review was the only workable means of achieving its vision of true holistic diversity—in both an *inter-* and *intra-*racial sense. That is precisely the sort of expert academic judgment to which this Court has virtually always deferred.

Moreover, the University of Texas did not arrive at its considered judgment in a vacuum. Rather, like countless other institutions, the University expressly relied upon this Court's long line of decisions affirming—and *re*affirming—the wide latitude universities enjoy to pursue holistic diversity through modest race-conscious means. To invalidate the University's

program now after decades of decisions affirming similar plans would destabilize American higher education, fatally undermine the academic autonomy of public universities, and erode the progress already achieved—and still needed—of greater holistic diversity in higher education and corresponding professions and leadership positions.

## ARGUMENT

### I. COLLEGES AND UNIVERSITIES HAVE A COMPELLING INTEREST IN ACHIEVING QUALITATIVE, HOLISTIC DIVERSITY

#### A. The Court Has Recognized A Compelling Interest In Seeking Diversity's Benefits

This Court has repeatedly recognized that institutions of higher learning have a compelling interest in the educational benefits that flow from a diverse student body.

In *Bakke*, Justice Powell wrote that a university's First Amendment freedom to make independent educational judgments "includes the selection of its student body." 438 U.S. at 311-12 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment)). Universities have various ideas how to accomplish their pedagogical objectives. Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 Hastings Const. L.Q. 557 (2003). But it is clear that one way universities may go about creating an ideal learning environment is to ensure that the admissions process

produces a diverse student body. *Bakke*, 438 U.S. at 311-15.

In *Grutter*, the Court adopted Justice Powell's rationale and held that the University of Michigan Law School had "a compelling interest in attaining a diverse student body." 539 U.S. at 328. The Court accepted the Law School's argument that it needed a critical mass of minority students because of the "substantial" educational benefits that flow from student-body diversity. *Id.* at 330; *see also id.* at 392-93 (Kennedy, J., dissenting) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity.").

And in *Fisher I*, the Court accepted and reiterated the rulings in *Bakke* and *Grutter* that "obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'" 133 S. Ct. at 2417-18 (quoting *Grutter*, 539 U.S. at 325). Indeed, so long as programs are "designed to benefit * * * all students, regardless of color, by enhancing diversity," this Court's precedent does not prohibit such policies. *Schuette*, 134 S. Ct. at 1640 (Scalia, J., concurring in the judgment).

### B. The Holistic Diversity That The University Of Texas's Admissions Program Seeks Is Exactly The Type Of Diversity This Court Has Encouraged

Significantly, however, the compelling state interest that *Bakke*, *Grutter*, and *Fisher I* recognized is not diversity for diversity's sake. Rather, diversity is a tool to further a university's educational mission. The Court approved of the use of diversity as a means to an educational end, not an end in itself.

Thus, courts should defer to a university's definition of the type of diversity that it needs to attain diversity's educational benefits. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (stressing that universities must receive "particular latitude in defining diversity"). After all, diversity is "idiosyncratic" and "dependent on the eye of the beholding institution," not reducible to a simple formula. *See* J. Harvie Wilkinson III, *From* Brown *to* Bakke 304 (1979). The Constitution does not prescribe any precise manner in which universities must define diversity for purposes of the Equal Protection Clause. *Fisher I*, 133 S. Ct. at 2418-20 (noting that the Court defers on this point to the "experience and expertise" of educational professionals); *Bakke*, 438 U.S. at 314 ("[A] university must have wide discretion in making the sensitive judgments as to who should be admitted.").

For example, in *Grutter*, the University of Michigan Law School determined that "a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." 539 U.S. at 333. The Law School explained that it needed a critical mass of minority students not because of "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue," but rather because "diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students." *Ibid.* And this Court deferred to the Law School's explanation for its need for a critical mass.

Similarly, here, the University of Texas has determined that purely numeric racial diversity—diversity based solely on skin color—is not sufficient to meet its educational goals. Rather, the University's interest is in achieving "holistic" diversity. Race is a component of that diversity, but only one component.

Such holistic diversity—as opposed to mere skin-color diversity—is precisely the type of diversity this Court not only has accepted but has essentially encouraged schools to pursue, emphasizing that individuals of the same race should not be seen as alike. "In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the

same political interests, and will prefer the same candidates at the polls." *Schuette*, 134 S. Ct. at 1634 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

Indeed, the type of diversity that the University of Texas seeks through its holistic-review program is the type of diversity of which Justice Powell spoke in *Bakke*. He emphasized that the interest in attaining the benefits of a diverse classroom "is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups." *Bakke*, 438 U.S. at 315. Rather, the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Ibid.*

### C. Holistic Diversity Produces Profound Educational Benefits

Extensive empirical data bear out the benefits of such diversity. *Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting) ("[T]he objective of racial diversity can be accepted based on empirical data known to [the Court]."). [2] Indeed, the benefits of such holistic diversity are myriad.

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[2] *See, e.g.*, Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661, 686-90 (2014) (showing "how benefits of diversity include improved learning for all students through an opportunity to hear and learn from people with viewpoints that may differ

(Continued on following page)

Diversity "enhance[s] classroom dialogue." *Fisher I*, 133 S. Ct. at 2418. Because "the process of learning occurs both formally in a classroom setting and informally outside of it," students of differing backgrounds often "stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 704-05 (2010) (Kennedy, J., concurring) (quotation marks omitted). Classroom conversations that incorporate diverse perspectives are superior because they are "personal and related to reality," and they "make the conversations livelier." Meera E. Deo, *The Promise of* Grutter: *Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. Race & L. 63, 100 (2011). Sparking conversation from various viewpoints is central to the very "business of a university": fostering that "atmosphere which is most conducive to speculation, experiment, and creation."

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from their own"); Charles E. Daye, et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. 75-S, 76-S (2012) ("[E]xtensive quantitative and qualitative empirical data support the finding that a racially diverse law student body provides educational benefits for students, for their institution, and for society, especially if there is significant interaction among students from diverse backgrounds."); Patricia Gurin, *The Compelling Needs for Diversity in Higher Education (Expert Report of Patricia Gurin)*, 5 Mich. J. Race & L. 363, 365 (1999) (providing statistical data indicating that "interaction with peers from diverse racial backgrounds," both in the university classroom and informally, lead to increased "learning outcomes").

*Fisher I*, 133 S. Ct. at 2418 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in judgment)). Students "become more open-minded while learning from classmates from different backgrounds." Deo, *Promise*, *supra*, at 100.

This is particularly true for law schools, where few "would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950); *see* Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 Fordham L. Rev. 3115, 3138-47 (2015) (discussing results from Diversity in Legal Academia project). Empirical research on law-school curricula suggests that "when students include examples from their own lives in detailing their perspectives, these contributions go a long way in making abstract legal theories more concrete and accessible." Deo, *Promise*, *supra*, at 97-98. Diversity helps ground legal concepts in the "broader social context." *Id.* at 100. Regardless of whether diversity in a law-school classroom changes students' minds, it allows students to "see things from different viewpoints and therefore understand legal issues better." *Id.* at 99.

Diversity ameliorates "racial isolation and stereotypes." *Fisher I*, 133 S. Ct. at 2418. Without sufficient diversity, "students of color are tokenized, treated as spokespeople for their race, and not expected to deviate from what others believe the racial 'norm' to be." Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661, 691 (2014). But

"having a critical mass of students of color provides an opportunity for a group's majority perspective to be included while also allowing for inter-group diversity and even opposition to what others from within the racial/ethnic group express." *Id.* at 690-91. Diverse educational environments thus promote social cohesion and dispel prejudices borne of unfamiliarity. *Grutter*, 539 U.S. at 330 (diversity "promotes cross-racial understanding," and "enables students to better understand persons of different races" (quotation marks and brackets omitted)). In doing so, diversity quells racial hostilities and helps to "bring[ ] about the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 394-95 (Kennedy, J., dissenting); *see also Parents Involved*, 551 U.S. at 788, 797 (Kennedy, J., concurring) (stressing that "[a] compelling interest exists in avoiding racial isolation" because the Constitution does not "mandate[ ]" that society "must accept the status quo of racial isolation in schools").

Diversity also "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 330. This is particularly true in the legal context given that "so much of the law requires the ability to look at problems from multiple angles, in order to fully understand different experiences and assumptions." Deo, *Promise*, *supra*, at 99. Furthermore, clients are increasingly global, and private law firms are increasingly international in scope. Deo, *Faculty Insights*, *supra*, at 3146. Studies have indicated that

diversity in classroom conversations better prepares students to deal with global clients and colleagues. *Id.* at 3146-47; Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 Willamette L. Rev. 541, 553-54 (1996). Moreover, empirical research has demonstrated that racial isolation in the classroom has negative consequences on academic performance and is associated with lower average test scores. Andy Sharma, Ann Moss Joyner, & Ashley Osment, *Adverse Impact of Racial Isolation on Student Performance: A Study in North Carolina*, 22 Educ. Pol'y Analysis Archives, No. 14, at 10 (2014).

Tradition, common sense, and empirical data, therefore, support the educational value of diversity. Indeed, race-conscious diversity is merely "an overdue update of th[e] time-honored concept" that diversity enriches higher education and "has been, historically, clearly related to a university's function." Wilkinson, *supra*, at 281-82, 303. After all, the mission of a university "is to prescribe the criteria of intelligent thought and action for a society." Charles W. Anderson, *Prescribing the Life of the Mind* xiv (1993). And because "[s]tudents may be shaped as profoundly by their peers as by their teachers," *Martinez*, 561 U.S. at 704 (Kennedy, J., concurring), diverse student bodies directly facilitate civic virtue, racial cooperation, and critical thinking—both within the university and beyond. *See, e.g.*, Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. Rev. 1130, 1145-46 (2013).

### D. The United States' International Commitments Support Holistic-Review Programs

The United States, moreover, is not alone in its use of race-conscious measures. In signing onto the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), the United States joined a global consensus of 168 other countries that permit "special measures" to achieve racial equality. *See* CERD, Art. 1(4) & 2(2), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969. Specifically, CERD encourages "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." *Id.* Art. 2(2). And CERD provides, like this Court's jurisprudence, that such measures "shall not be deemed racial discrimination" as long as they do not "continue[ ] after the objectives for which they were taken have been achieved." *Id.* Art. 1(4)).

Thus, the United States' existing commitments in the global community support holistic-review programs. *See* Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 Emory Int'l L. Rev. 197, 242 (2011) (noting that international norms support the use of affirmative-action programs until "the goals of equality have been fulfilled"); Marjorie Cohn, Essay, *Affirmative Action and the Equality Principle in Human Rights Treaties:*

*United States' Violation of Its International Obligations*, 43 Va. J. Int'l L. 249, 251 (2003) ("[A]ffirmative action treaty mandates constitute not only international obligations, but also constitute a compelling government interest to support race-based affirmative action programs."); Jordan J. Paust, Essay, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659, 659 (1997) (observing that international law "provides significant affirmation of the legal propriety of race-based affirmative action").[3]

## II. THE UNIVERSITY OF TEXAS'S INDIVIDUALIZED ADMISSIONS POLICY IS NARROWLY TAILORED TO ATTAIN THE EDUCATIONAL BENEFITS OF QUALITATIVE, HOLISTIC DIVERSITY

The University of Texas's holistic-review program is narrowly tailored to achieve the University's compelling interest in the benefits of qualitative, holistic diversity. Strict scrutiny requires that a law "be narrowly tailored, not that it be 'perfectly tailored.'"

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[3] *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR), GA. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 (prohibiting discrimination or distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status); *see also* 138 Cong. Rec. 8068-71 (1992) (declaring that the United States' obligations under ICCPR "permitted" race-conscious measures that "are, at a minimum, rationally related to a legitimate governmental objective").

*Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015); *see Bush v. Vera*, 517 U.S. 952, 998-99 (1996) (Kennedy, J., concurring) (narrow tailoring requires that laws be "reasonably necessary to serve a compelling interest"). A race-conscious admissions policy is narrowly tailored when its consideration of race is reasonably necessary to "achieve the educational benefits of diversity," *Fisher I*, 133 S. Ct. at 2420, particularly when that consideration is holistic and individualized. Race may be considered as one "modest factor among many others," *Grutter*, 539 U.S. at 392-93 (Kennedy, J., dissenting), when "no workable race-neutral alternatives" would likely achieve the university's particular vision of diversity, *Fisher I*, 133 S. Ct. at 2420. The University of Texas's holistic-review program readily satisfies that standard.

### A. The University Of Texas's Admissions Policy Is Holistic And Individualized

Like many other admissions policies, the University of Texas's holistic-review policy considers race as only one modest factor in the context of an individualized assessment of each applicant. For those applicants not admitted under the Top 10% Plan, the University evaluates leadership, extracurricular activities, honors or awards, work experience, socioeconomic status, and race in the unique context of each applicant's entire experience, *Fisher I*, 133 S. Ct. at 2415-17, thus benefitting minority and nonminority applicants alike.

The use of race in this review process is targeted and narrow. In fact, "the weight given to race in UT undergraduate admissions is less than that upheld in *Grutter*." Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 J. Const. L. 463, 529 (2012); *see also* Pet.'s Br. 8-9 (acknowledging that "race can be determinative only for * * * a small segment of the freshman class"). The University of Texas's approach "ensure[s] that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Fisher I*, 133 S. Ct. at 2420 (quotation marks omitted); *see Grutter*, 539 U.S. at 392-93 (Kennedy, J., dissenting) (reasoning that race-conscious policies are narrowly tailored when "each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking"); *Parents Involved*, 551 U.S. at 788-89 (Kennedy, J., concurring) (reaffirming this principle); Alexander M. Bickel & Philip B. Kurland, DeFunis *Is Moot—The Issue Is Not*, 1 Learning & L. 17, 19, 62 (1974) (distinguishing "a racial quota" from "legitimate affirmative action" and suggesting the latter may involve "a case where race was used as one among many factors to determine admission").

### B. The University Of Texas's Holistic-Review Program Is Necessary To Attain Holistic Diversity

The holistic-review program is necessary to achieve the University of Texas's compelling interest

in qualitative, holistic diversity. While the Top 10% Plan has achieved a measure of numerical diversity, it has not been sufficient to achieve the type of qualitative diversity that the University deems central to its educational mission. As this Court has reaffirmed, universities need not exhaust "every *conceivable* race-neutral alternative" in order to satisfy strict scrutiny. *Fisher I*, 133 S. Ct. at 2420. Rather, strict scrutiny is met when universities, after "serious, good faith consideration," legitimately conclude that they cannot "achieve *sufficient* diversity" with "available, workable race-neutral alternatives." *Id.* (emphasis added).

Here, the University of Texas implemented its *Grutter*-compliant admissions program after trying for seven years to achieve qualitative diversity with its Top 10% Plan alone. During that seven-year period, the University saw increases only in statistical diversity—*i.e.*, the "simple ethnic diversity" that does not further a "compelling state interest" in educational diversity. *Fisher I*, 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315). This is not surprising: the Top 10% Plan does not expressly consider diversity of thought, viewpoint, or experience. *See* Harpalani, *Diversity Within Racial Groups*, *supra*, at 498-500. While it increases statistical diversity by automatically admitting the top 10% of students at high schools where the students are predominantly minority, that is only one measure of diversity. The Top 10% Plan leaves out students who may not be in the top 10% of their graduating class but who the University may consider to contribute to diversity in

ways that students admitted through the Top 10% Plan may not. Thus, after comprehensive, good-faith consideration, the University determined that a holistic, race-conscious program is necessary to achieve its vision of qualitative diversity.

Empirical research and lived experience confirm that purportedly race-neutral admissions programs are no substitute for holistic programs like the University of Texas's. *See, e.g.*, Catherine L. Horn & Stella M. Flores, The Civil Rights Project: Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 12, 59-60 (2003); *see also* Marvin Lim, *Percent Plans: A "Workable, Race-Neutral Alternative" To Affirmative Action?*, 39 J.C. & U.L. 127, 132, 141-62 (2013). In California, for example, which prohibits affirmative action, empirical studies have demonstrated that "class-based affirmative action programs cannot substitute for race-conscious policies at highly selective American colleges and universities." William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the* Fisher *Case*, 39 J.C. & U.L. 53, 116 (2013). Indeed, although the "correlation between race and family income" is "strong," it "is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity." Alan Krueger, et al., *Race, Income and College in 25 Years: The Continuing Legacy of Segregation and Discrimination* 32 (Nat'l Bureau of Econ. Res., Working Paper 11445, June 2005), http://www.nber.org/papers/w11445.pdf. When coupled with the University of Texas's own

experience from 1996 to 2003, these studies underscore the University's considered judgment that no "race-neutral alternatives" could "achieve *sufficient* diversity" for purposes of UT's particular "educational mission." *See Fisher I*, 133 S. Ct. at 2419-20 (emphasis added).

Petitioner's argument that race-conscious measures are unnecessary because "UT is one of the most diverse public universities in the country," Pet.'s Br. 24, is mistaken in that it focuses on skin color alone. Universities have a compelling interest in the educational benefits from a diversity of viewpoints—race being but a single element of such diversity. Contrary to petitioner's assumptions, diversity is both "color-conscious" and "color-blind." Wilkinson, *supra*, at 304. On the one hand, diversity and holistic review are inherently race conscious because race is part of each individual's unique experience and identity. *See* Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After* Fisher, 45 Seton Hall L. Rev. 761, 768-69, 796-805 (2015). On the other, diversity is also "color-blind," because all individuals "are different" and thus all individuals "can be diverse." Wilkinson, *supra*, at 304.

By "focus[ing] *solely* on ethnic diversity," petitioner's contentions "hinder rather than further attainment of genuine diversity." *Bakke*, 438 U.S. at 315. Indeed, it is precisely because "all individuals of the same race" do not "think alike," *Schuette*, 134 S. Ct. at 1634, that the *qualitative* diversity provided

by the University of Texas's holistic-review program is necessary to supplement the *quantitative* diversity achieved by the Top 10% Plan.

### C. Purportedly "Race Neutral" Alternatives Do Not Achieve Holistic Diversity

#### *1. The Top 10% Plan is not a "race-neutral" alternative to a holistic admissions program*

Petitioner argues that "there are numerous other available race-neutral means of achieving" diversity. Pet.'s Br. 47. She points primarily to the Top 10% Plan as a race-neutral alternative that has driven increases in the enrollment of minority students at the University of Texas. *Id.* at 10-11.

Contrary to petitioner's suggestion that the Top 10% Plan is a race-neutral alternative, that plan does take race into account. As the Fifth Circuit explained, the Top 10% Plan increases diversity solely because of the "de facto segregation of schools in Texas." Pet. App. 32a-33a; *see id.* at 33a-38a & nn.98, 101. Texas developed the Top 10% Plan "against the backdrop of this challenged reality in their effort to achieve a diverse student body." Pet. App. 33a. That is, *conscious of the racial makeup* in Texas schools, the Texas political branches devised the Top 10% Plan as a way to achieve racial diversity, without having to overtly consider race at the point of admission. Thus, contrary to petitioner's assertions, the Top 10% Plan is a deliberately race-conscious program that merely moved the consideration of race from the University

of Texas admissions office to a point earlier in time, when Texas officials devised the plan.

That the Top 10% Plan actually does consider race undermines petitioner's argument that diversity can be achieved through race-neutral means. And if race must be taken into account to attain a diverse class, better to allow schools to do so in the context of a highly individualized, holistic-review process. A percentage plan is a blunt instrument that, at least in Texas, arguably relies more on race than a holistic admissions program. *See* Pet. App. 32a-38a. Yet petitioner agrees that the Top 10% Plan comports with the Constitution. Pet.'s Br. 47 (arguing that Texas should "uncap[ ] the Top 10% Law"). If such a deliberately race-conscious program is Constitutional, then surely so must be the modest consideration of race in a holistic assessment of multiple factors that also bear on the broader diversity needed to achieve the University's educational objectives.

### 2. *Holistic admissions programs must be race conscious, else they are not truly holistic*

There is no dispute that the University of Texas can perform holistic review for the students not admitted under the Top 10% Plan. Rather, petitioner asserts only that the University's holistic review cannot consider race. But race-blind holistic review is not only a contradiction in terms, it is infeasible. *See* Harpalani, *Narrowly Tailored*, *supra*, at 788-90;

Mario L. Barnes, Erwin Chemerinsky, & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. Rev. 272, 290 (2015); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139, 1146-48 (2008).

To be effective, holistic review must be truly *holistic*—that is, it must assess each applicant as an individual to the fullest possible context of his or her life, talents, and experiences. *Grutter*, 539 U.S. at 392-93 (Kennedy, J., dissenting). And because it cannot seriously be disputed that race often provides critical insight into the lives and experiences of applicants, *see Bakke*, 438 U.S. at 317-18 & n.51, holistic review is simply not possible without considering race as one modest factor among many others, *see* Barnes, Chemerinsky, & Onwuachi-Willig, *supra*, at 290-91. Race and culture remain factors of enormous significance in the totality of one's experiences. Put simply, because peoples' lives are not "color blind," neither can a holistic admissions policy be.

As long as schools evaluate more than simply test scores and grades, the exclusion of race from consideration is unavoidable as a practical matter. Carbado & Harris, *supra*, at 1146-48. Admissions officers may inadvertently discern an applicant's race many ways—via essays, personal statements, activities, as well as "names which are highly correlated with racial group membership." Vinay Harpalani,

Fisher's *Fishing Expedition*, 15 U. Pa. J. Const. L. Heightened Scrutiny 57, 69 (2013). Consider a college application from an individual who lists youth leadership in his or her African Methodist Episcopal Church as an activity. Or consider an application from a first-generation Latina high-school senior whose personal essay discusses her immigrant parents' experiences and how she learned to thrive in an English-dominated culture even though Spanish is the language spoken at home. If the reader is to conduct holistic review but cannot consider race, the reader is confronted with uncomfortable choices about how to handle these applications.

Moreover, if the reader cannot consider race, the reader would be confronted with an impossible task, because race affects assessments of individuals consciously or unconsciously, regardless of intentions and any mandate from this Court. As a result, removing the term "race" from the cover of an admissions form does not remove the concept of "race" from the admissions process. Harpalani, *Fishing Expedition*, *supra*, at 69. Social psychology has shown that even when people are instructed to ignore or disregard certain information, "they tend to incorporate it into subsequent judgments nonetheless." Daniel M. Wegner, et al., *Paradoxical Effects of Thought Suppression*, 53 J. Personality & Soc. Psychol. 5, 6-9 (1987); *see also* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974). Just as Dostoevsky's polar bear will occupy the mind of anyone challenged *not* to think about it,

so too will the admonition not to think about race generate an unspoken preoccupation with that subject. *See* Linda Hamilton Krieger, *Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1240 (1995).

Accordingly, "eliminating the express consideration of race" would not "eliminat[e] race itself from the admissions context." Carbado & Harris, *supra*, at 1146. Rather, it would simply turn race into an unstated factor that nonetheless would affect admissions decisions but without the transparency and fairness of including it as an overt factor among many others.

### 3. *Eliminating consideration of race from holistic review would penalize applicants for whom race is central to their identities and experiences*

Despite its seeming neutrality, a rule precluding consideration of race in a holistic admissions process would disadvantage applicants for whom race is a significant part of their application. Like all private speakers, applicants have a protected interest in speaking about race and ethnicity (including their own), and the State generally may not regulate such speech based on its content. *See R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992). But formally race-blind policies not only discount expressions of racial identity based on their content, they also disadvantage applicants whose accomplishments, experiences, and

talents are best understood in light of their complete identity, including race. Carbado & Harris, *supra*, at 1146-52, 1186, 1191-93.

As *Bakke* recognized, race is integral to the identity and experiences of many qualified applicants. 438 U.S. at 317 n.51 ("[R]ace can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished—and against what odds." (quotation marks omitted)). Indeed, "the life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race." Carbado & Harris, *supra*, at 1148. Racial identity provides "a fuller picture" of some applicants' backgrounds and thus a clearer understanding of "their merits for admission." Barnes, Chemerinsky, & Onwuachi-Willig, *supra*, at 292-93.

By excluding such details, however, race-blind policies discourage expressions of racial identity and favor those "applicants who subordinate or suppress their race." Carbado & Harris, *supra*, at 1149. Such policies destroy the communicative impact of certain individuals' achievements and impoverish the admissions process. *See* Barnes, Chemerinsky, & Onwuachi-Willig, *supra*, at 292-93. In doing so, race-blind policies disadvantage "applicants for whom race is a fundamental part of their sense of self," and privilege those "applicants who (a) view their racial identity as irrelevant or inessential and (b) make no express mention of it in the application process." Carbado & Harris, *supra*, at 1148-49.

To be sure, race-blind policies do not, by their literal terms, prohibit discussion of race. But such policies nonetheless tell applicants that only certain aspects of their identity are worth considering—and that the State will define for them what aspects will matter. *Ibid.* This Court's decisions do not permit such intrusions on "the individual's right to self-define." Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Cal. L. Rev. 1209, 1222 (2003); *see also Bakke*, 438 U.S. at 317-18 (stressing that the unique qualifications expressed in an individual's application must be placed "on the same footing for consideration").

Indeed, just as individuals may not be "forced to live under a state-mandated racial label," *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring), neither should they be forced to endure a state-mandated label that overtly devalues their racial identity, *see* Carbado & Harris, *supra*, at 1213-14. "Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). After all, "the right to define one's own concept of existence" and "personhood" would be meaningless were such views "formed under compulsion of the State." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quotation marks omitted). Yet this is precisely what petitioner seeks, by requiring applicants to public institutions of higher learning to eliminate or mask

their race when presenting their individual "personhood" for consideration for admission. Regardless of whether the Constitution permits such an imposition, it certainly cannot be read to *require* it. *See Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality op.) (reasoning that it would be a sad "irony" if the Equal Protection Clause "were interpreted to entrench racial differences").

## III. EVEN IF THE UNIVERSITY OF TEXAS'S PLAN IS NOT NARROWLY TAILORED, CONSIDERATION OF RACE MUST BE PERMITTED IN OTHER CIRCUMSTANCES

Regardless of what the Court decides about the University of Texas's holistic-review admissions policy, this Court should reiterate that other institutions of higher learning—particularly law schools and other professional schools—may be permitted to consider race in admissions, as this Court held in *Bakke* and *Grutter*.

As discussed in Part I.C, law schools have a particularly compelling interest in having diverse student bodies. As amicus's members can attest from experience, legal doctrines take on new meaning when applied in different contexts, and student diversity significantly helps students understand legal issues from different perspectives. Moreover, law schools must train students to see legal issues from all sides, in order to strengthen the quality of their arguments. And law schools must prepare students for an increasingly global and diverse world.

But percentage plans do nothing to further graduate and professional schools' compelling need for diversity because such schools do not draw students from a fixed geographic area in which the racial makeup of schools is highly concentrated. Thus, even if the University of Texas's percentage plan is deemed an adequate "race-neutral alternative," this Court should not disturb the fundamental rule of *Bakke* and *Grutter*. Race-conscious admissions policies may still be necessary to achieve diversity at many, if not most, law schools and other institutions of higher learning.

Because diversity is nuanced and many faceted, the blunt tools of a percentage plan cannot alone achieve meaningful educational diversity in all circumstances. Different universities in different states must be free to tailor their admissions programs to meet their own demographics, financial resources, and educational objectives. Courts are not equipped to fashion these policies, and the judicial process is not equipped to evaluate such policies on an ongoing basis, as universities can and must. *See Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring) (noting the importance of "the creativity of experts" and "administrators" in "continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds").

Fidelity to precedent is particularly salient here given the reliance interests at stake. Law schools and universities across the Nation have indisputably adopted race-conscious policies partly in reliance on this Court's decisions in *Grutter* and *Bakke*. *See*

*Fisher I*, 133 S. Ct. at 2416; Pet.'s Br. 48 (acknowledging that the University of Texas, like many schools, understood *Grutter* to permit "incorporation of race into admissions decisions as long as the system is 'holistic'"). Public institutions have carefully studied this Court's decisions to determine how they could achieve diversity's educational benefits while still comporting with the Constitution's requirements. Amicus's members have been involved in helping to painstakingly craft law-school-admissions programs that take race into account without assigning race any numerical score.

Colleges and universities are ill prepared to develop new strategies for boosting diversity in admissions without considering race. In a recent survey of admissions directors, only 6% reported that their institution had created a specific plan for how it would handle admissions if this Court were to limit or ban considering race in admissions. 2015 Inside Higher Ed. Survey of College & University Admissions Directors, at 26, https://www.insidehighered.com/system/files/media/booklet-admission-survey-2015.pdf.

In light of the important reliance interests of school administrators and professors throughout the Nation, *stare decisis* demands that this Court follow its decisions permitting race-conscious admissions policies. *See Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2410 (2015). Indeed, *Grutter*'s central holding reflects a stable constitutional rule that dates back more than 35 years. Since *Bakke*, it has been understood that the Constitution permits

universities to "use race as *one* factor in deciding to admit students so long as other factors are also used in an effort to achieve diversity in the student body." Robert J. Bork, *A Murky Future*, 2 Reg. 36 (1978). Over time, that decision's core has been clarified and refined in the crucible of subsequent decisions, *see* Akhil Reed Amar & Neal Kumar Katyal, Bakke's *Fate*, 43 UCLA L. Rev. 1745, 1754-80 (1996), and this Court's reaffirmations of *Bakke*'s core principle have engendered the reliance of university administrators and state legislators.

Hence, as petitioner tacitly recognizes, a ruling against the University of Texas would upend diversity measures that "have become a standard element of admissions systems of universities throughout the country." Pet.'s Br. 48. As one university president put it, a decision "that it's unconstitutional to consider race at all will have domino effects across the whole country, and will sweep across private universities as well as public ones." Tamar Lewin & Richard Pérez-Peña, *Colleges Brace for Uncertainty as Court Reviews Race in Admissions*, N.Y. Times (July 1, 2015), at A14. Indeed, "[k]nocking out" the University of Texas's "present system in favor of a strictly enforced color-blind norm would cause a huge upheaval in a system that" can be better adjusted "by administrators on campus." Richard A. Epstein, *The Classical Liberal Constitution* 539 (2013).

In addition, *stare decisis* is not simply a means of preserving reliance interests; its stabilizing force has independent constitutional weight. Charles Fried,

*Saying What The Law Is* 241 (2004) (reasoning that, unless "the Court is in fact constrained by doctrine," "there is no constitutional law; there are only constitutional decisions"). As Justice Powell stressed in *Bakke*, the "consistent application of the Constitution from one generation to the next" is "a critical feature of its coherent interpretation." 438 U.S. at 299. Constitutional decisions take "root[ ] throughout the community" and provide "continuity over significant periods of time." *Ibid.* Accordingly, this Court "ha[s] always required" a "special justification" for overruling constitutional precedent. *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).

But here, no special justification exists for overruling the central principle of *Bakke* and *Grutter*. As many have noted, *Bakke* stands as a "super-precedent" in that (1) "[i]t is a well tested precedent in court," (2) "it has become the foundation for legal doctrine," and (3) "there has been substantial societal reliance in the U.S. and even abroad." Mark S. Kende, *Is* Bakke *Now a Super-Precedent and Does it Matter? The U.S. Supreme Court's Updated Constitutional Approach to Affirmative Action in* Fisher, 16 U. Pa. J. Const. L. Heightened Scrutiny 15, 24 (2013). Thus, given the "venerability" of *Bakke* and "the difficulty of changing, or even clearly identifying, the intervening law that has been based on [it]," this Court should affirm that decision and its progeny. *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34 (1989) (Scalia, J., concurring in part and dissenting in part).

## CONCLUSION

For the reasons set forth above and in respondents' brief, the Fifth Circuit's judgment should be affirmed.

Respectfully submitted,

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